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IN THE

Supreme Court of the United States

October Term, 1963

No. 911

ANTONIO RODRIGUEZ SILVA,

Petitioner,

vs.

HARLAN B. CARTER, as Regional Commissioner, Immigration and Naturalization Service, Southwest Region, San Pedro, California,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Opinions Below.

The opinion of the Court of Appeals for the Ninth Circuit, dated December 30, 1963, (Appendix A) is reported at 326 F. 2d 315. The Memorandum Decision of the United States District Court for the Southern District of California, Central Division, filed December 12, 1962 (Appendix B), is unreported. The decision of the respondent, Regional Commissioner of the Immigration and Naturalization Service, dated December 4, 1961, is appended hereto as Appendix C.

Jurisdiction.

The judgment of the Court of Appeals for the Ninth Circuit was filed and entered on December 30, 1963. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

Question Presented.

Whether, in an administrative immigration proceeding involving an application for a discretionary benefit, the officials are required to expressly rule on the alien's statutory eligibility for such benefit before invoking and exercising their discretionary powers.

Statutes and Regulations Involved.

The statutes involved are Section 249 of the Immigration and Nationality Act of 1952 (8 U. S. C. 1259), and Section 5 of the Act of September 11, 1957 (71 Stat. 640), repealed and re-enacted on September 26, 1961 (75 Stat. 655) as Section 212(g) of the Immigration and Nationality Act (8 U. S. C. 1182(h)).

The regulation involved is Section 249.1, Title 8, Code of Federal Regulations.

The text of the aforesaid statutes and regulation is printed in Appendix D.

Statement of the Case.

Petitioner was born on February 22, 1908. His father died when he was one year old. His mother died when he was eight. Petitioner was first brought to the United States from Mexico by an older brother, entering at El Paso, Texas about March 16, 1918. The Immigration and Naturalization Service has not found any record of this arrival. On January 30, 1961, peti-

tioner applied to the Los Angeles office of the Service to create a record of lawful permanent residence as of March 16, 1918, under Section 249 of the Immigration and Nationality Act (hereinafter referred to as the "Act"). Based on information given to him by the brother, petitioner believed since a young man and claimed for many years that he was born in the State of Arizona and was a citizen of the United States. However, following a deportation hearing commenced in June, 1958, the Service found that there was evidence that petitioner was a native and citizen of Mexico, and issued a warrant of deportation which is still outstanding.

One of the statutory prerequisites for creating a record of lawful admission for permanent residence under Section 249 is that the applicant satisfy the Attorney General that he is not inadmissible under Section 212(a) of the Immigration and Nationality Act insofar as that Section relates to the criminal classes. Petitioner did not meet this requirement since he was convicted on January 23, 1953 in California of six counts of grand theft, a crime involving moral turpitude, and this rendered him inadmissible under Section 212(a)(9). However, there is a statutory provision by which certain otherwise eligible aliens who are inadmissible under *Paragraph (9)*, (10), or (12) of Section 212(a) of the Act, may request a waiver of such ground of inadmissibility. During the time of petitioner's application in 1961, this remedial law was Section 5 of the Act of September 11, 1957, later re-enacted as Section 212(g) of the Act. The statute provides that an alien excludable under Section 212(a)(9), (10) or (12), *shall*, if otherwise admissible, be issued a visa and ad-

mitted to the United States for permanent residence if he is of an indicated relationship to a United States citizen or lawful resident alien and satisfies other specified conditions. The conditions are discussed hereinafter.

Petitioner was married twice to his present wife, with one intervening marriage and divorce. He lives with his wife and two minor children who are wholly dependent. He contributes also to the support of another minor child the issue of his second wife.

The District Director of the Service at Los Angeles, California took testimony relative to the applications and denied the waiver and, also, as a consequence, the Section 249 application. The respondent, Regional Commissioner, affirmed. The United States District Court and the Court of Appeals have upheld the administrative decision.

The jurisdiction of the District Court was invoked under the provisions of Section 10 of the Administrative Procedure Act (5 U. S. C. 1009, 60 Stat. 243), and the Declaratory Judgment Act (28 U. S. C. 2201).

Reasons for Granting the Writ.

The question presented is important to clarify and insure that, in administrative proceedings, conducted by the Immigration and Naturalization Service, the merits of an issue be determined only by utilization of fair and fundamental methods preserving the spirit of the legislature in such remedial enactments as Section 212(g).

The holding of the Circuit Court that respondent did not err in denying the request for waiver without first

making an express ruling on the second element of statutory eligibility is in conflict, at least in principle, with the ruling of this Court in *Jay v. Boyd*, 351 U. S. 345, 353, 76 S. Ct. 919 (1956), involving the discretionary form of relief known as suspension of deportation, wherein it was said that eligibility for the relief was governed by specific statutory standards *"which provide a right to a ruling on applicant's eligibility."*

The court below admitted the analogy of the statement in the *Jay* case to the problem in the case at bar (p. 320), and conceded that where relief is denied on the ground of ineligibility, there must be a full and fair hearing and that such ruling is subject to full court review, as in *McGrath v. Kristensen*, 340 U. S. 162, 169, 71 S. Ct. 224 (1950). Nevertheless, it said, there was nothing to indicate discretionary relief was denied by the respondent on the ground of ineligibility.

To summarize the conclusions: The District Director found that petitioner failed to establish the first statutory prerequisite of "extreme hardship" to his wife and children. The Regional Commissioner (respondent) reversed this finding. Neither the District Director nor the Regional Commissioner determined whether petitioner met the second statutory eligibility requirement, *i.e.*, that his admission be not contrary to the national welfare, safety or security, and the court below concedes this omission (p. 319). After by-passing this element, the administrative officials declared that the "waiver" was denied in the exercise of discretion. The trial court, after first commenting that petitioner to prevail must establish to the satisfaction of the Attorney General that his admission would not be contrary to the national welfare, found it necessary to supply an

interpretation of respondent's language, by declaring (Appendix B, p. 2):

> "But what the (Regional) Commissioner *was saying* was that (petitioner) had failed to establish his admissibility to the satisfaction of the Attorney General, and that he was therefore exercising his discretion unfavorably on the ground stated."

The court below utilized a series of assumptions (p. 319), *i.e.* (1) respondent assumed that petitioner *did not* meet this second eligibility requirement; (2) respondent assumed that petitioner *did* meet this requirement; or (3) respondent *made no assumption or sub silentio ruling* whatever concerning the requirement, and then reasoned that petitioner could not have been prejudiced under any of the assumed situations by the lack of an express ruling as to eligibility.

We urge, however, that prejudice does flow from ignoring, failing to mention, or remaining silent upon a statutory eligibility requirement because it effectively prevents any later challenge in court that an error of law was committed by denying relief on an improper legal basis; further, it permits certain facts and events of the individual case which normally would and should be evaluated in deciding eligibility, to be so grouped and manipulated in the final phase of exercise of discretion that the decision is immune from attack unless shown to be clearly arbitrary (See Immigration Law and Procedure, Gordon and Rosenfield, Sec. 8.15, p. 862 *et seq.*).

For example, in petitioner's case, the matter of petitioner's so-called "political activities" (utilized in denying discretion) would probably be more appropriately

weighed and decided in the second statutory element of admission contrary to national welfare, safety or security, upon which no ruling was made. Similarly, "his (petitioner's) conviction for grand theft and subsequent reincarceration as a parole violator", (utilized in denying discretion) are matters seemingly more appropriate to the second statutory element, if at all, since it seems hardly fair to employ, as a means of denial, the identical event (the crime) that the legislature benevolently permitted might be "waived" administratively. In the same "waiver" statute, the authorities are empowered to excuse prior acts of immorality or prostitution within Section 212(a) (12) of the Act. Would it not be unorthodox and incorrect to base a denial of a "waiver" under that subdivision upon the identical acts for which the dispensing grace is sought? Additionally, petitioner's "most recent trial for vote fraud * * * which although ending in acquittal * * *" (utilized in denying discretion) might best be considered in the second statutory element, albeit its consideration at all as an adverse factor seems questionable since even an indictment does not constitute proof of the commission of an offense. *Tot v. United States*, 319 U. S. 463, 466, 63 S. Ct. 1241, 1244.

What has happened here is that respondent, in denying "discretion", utilizes the major events that are within the scope of the unmentioned second statutory element and should be evaluated there. This certainly affects the final phase of discretion. An analogy would be a case where a statutory prerequisite required a showing of good moral character, and, without any ruling whatsoever on this element, the trier of facts bases a denial of discretion on the ground, for example, that

there was evidence of defrauding some person or entity. Such procedure blocks any challenge that an error of law has been committed.

Needless to say, the stakes here are considerable for petitioner who faces deportation and exile from his citizen wife and nine children should his application for remedial relief fail. Since the rulings on statutory eligibility are such an integral part of the ultimate discretionary determination, the former are too important to rest in the realm of silence, conjecture, or assumption. If an alien is entitled to a full and fair hearing on statutory prerequisites (*Jay v. Boyd, supra*), an express administrative ruling on each element should follow as a minimal requirement. The omission to perform such simple and orderly steps stigmatizes the decision, in reality, as a failure to exercise discretion at all.

The fact that there is no express statutory or regulatory grant of a right to a hearing on a Section 212(g) waiver or a Section 249 application (as distinguished from *Jay* and other cases governed by the rules relating to deportation hearings (8 C. F. R. 242 *et seq.*) should not be a determining factor since 8 C. F. R. 249.1 (Appendix D) authorizes consideration of the waiver and provides that the applicant is to be notified of the *reasons* for denial of a Section 249 application. Certainly the compilation of *reasons* embraces an orderly process giving effect to elementary and fair principles in evaluating and reporting statutory prerequisites

In *Sovich v. Esperdy*, 319 F. 2d 21 (1963), at page 26, Judge Waterman of the Second Circuit compiled cases wherein courts have granted relief to deportable

aliens when the Attorney General had misconstrued the limits or terms of his discretionary power under the suspension of deportation statute. None of the issues confronting the court in those collected cases would have arisen if the administrative officials had remained *sub silentio*, as here, and made no ruling on a statutory prerequisite.

Conclusion.

For the foregoing reasons, the petition for writ of certiorari should be granted. The relief petitioner seeks is that the administrative decision be set aside and the case remanded to the Immigration and Naturalization Service for furthur consideration.

Respectfully submitted,

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Attorney for Petitioner.

Dated March 10, 1964.

APPENDIX A.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals, for the Ninth Circuit.

Antonio Rodriguez Silva, Appellant, vs. Harlan B. Carter, as Regional Commissioner, Immigration and Naturalization Service, Southwest Region, San Pedro, California, Appellee. No. 18,560 Dec. 30, 1963.

Before: Chambers and Hamley, Circuit Judges, and Jameson, District Judge

Hamley, Circuit Judge:

Antonio Rodriguez Silva brought this action to set aside an order of the Immigration and Naturalization Service (Service), denying Silva's application for adjustment of status to that of a lawful permanent resident. Plaintiff also sought a judicial declaration that he has established his eligibility for, and should be granted, such status. Harlan B. Carter, as Regional Commissioner for the Service at San Pedro, California, was named defendant. District court jurisdiction was asserted under section 10 of the Administrative Procedure Act,[1] and the Declaratory Judgment Act, 28 U.S.C. § 2201 (1958).

Judgment was entered for defendant and Silva appeals. He contends that administrative officials erred in invoking discretionary powers without first determining his statutory eligibility for the relief requested; erroneous factual determinations were made amounting to "arbitrariness"; the Regional Commissioner was ar-

[1] 60 Stat. 243, 5 U.S.C. § 1009 (1958).

bitrary and capricious in considering matters outside the record when invoking his discretionary powers; a fair hearing before the district director was not accorded; and the decision of the agency should be set aside so that new procedures, which became effective on January 22, 1962 could be invoked.

Silva was born in Mexico on February 22, 1908. He first entered the United States from Mexico on March 16, 1918 at El Paso, Texas, although no record of that entry has been found. Silva has had his residence in the United States continuously since that date, but has made several departures and reentries. He last entered the United States at Nogales, Arizona, on July 3, 1957, after an absence of about eighteen days in Mexico.

Silva is married to a native and citizen of the United States and is the father of nine children who are citizens of the United States. On January 23, 1953, he was convicted in the courts of California on six counts of grand theft, a crime involving moral turpitude. He entered prison in October, 1953, and was released on parole two years later. On June 5, 1958, Silva was sent back to prison as a parole violator, being finally released in October, 1959, after serving his full sentence.

On July 1, 1959, the Service entered an order for Silva's deportation to Mexico. This order has not been executed and is still outstanding.

On January 27, 1961, Silva filed an application under section 249 of the Immigration and Nationality Act (Act),[2] for a record of lawful admission for perma-

[2] 72 Stat. 546, 8 U.S.C. § 1259 (1958). This statute reads: "A record of lawful admission for permanent residence may, in the discretion of the Attorney General and under such regulations as he may prescribe, be made in the case of

nent residence. This relief, if granted, would have given Silva a basis for asking that the order of deportation be set aside.

One of the statutory prerequisites for such relief is that the applicant satisfy the Attorney General that he is not inadmissible under section 212(a) of the Act,[3] insofar as that section relates to criminals, procurers and other immoral persons, subversives, violators of the narcotic laws or smugglers of aliens. As the record then stood, Silva could not meet this requirement, as his previous conviction of a crime involving moral turpitude rendered him inadmissible under section 212(a)(9).

There is, however, a procedure under which certain otherwise eligible aliens who are inadmissible under paragraphs (9), (10) or (12) of section 212(a) of the Act, may request a waiver of such ground of inadmissibility pursuant to the provisions of section 5 of the

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any alien, as of the date of the approval of his application or, if entry occurred prior to July 1, 1924, as of the date of such entry, if no such record is otherwise available and such alien shall satisfy the Attorney General that he is not inadmissible under section 212(a) insofar as it relates to criminals, procurers and other immoral persons, subversives, violators of the narcotic laws or smugglers of aliens, and he establishes that he—

(a) entered the United States prior to June 28, 1940;

(b) has had his residence in the United States continuously since such entry;

(c) is a person of good moral character; and

(d) is not ineligible to citizenship.

[3]At the time of these proceedings section 212(a)(9) of the Act was 66 Stat. 182, 8 U.S.C. § 1182(a)(9) (1958). On September 26, 1961, this section was amended by 75 Stat. 655, 8 U.S.C. § 1182(a)(9) (Supp. IV 1963).

Act of September 11, 1957, now section 212(g) of the Act.[4] This procedure is provided for in 8 C.F.R. § 249.1, as amended.[5] Seeking to take advantage of this

[4]During the relevant time, section 5 of the Act of September 11, 1957, 71 Stat. 640, 8 U.S.C. § 1182b (1958), read:

"SEC. 5. Any alien, who is excludable from the United States under paragraphs (9), (10), or (12) or section 212 (a) of the Immigration and Nationality Act, who (A) is the spouse or child, including a minor unmarried adopted child, of a United States citizen, or of an alien lawfully admitted for permanent residence, or (B) has a son or daughter who is a United States citizen or an alien lawfully admitted for permanent residence, shall, if otherwise admissible, be issued a visa and admitted to the United States for permanent residence (1) if it shall be established to the satisfaction of the Attorney General that (A) the alien's exclusion would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, or son or daughter of such alien, and (B) the admission to the United States of such alien would not be contrary to the national welfare, safety or security of the United States; and (2) if the Attorney General, in his discretion, and pursuant to such terms, conditions, and procedures as he may by regulations prescribe, has consented to the alien's applying or reapplying for a visa and for admission to the United States."

This section was repealed by 75 Stat. 657, enacted on September 26, 1961. At the same time, however, virtually identical provisions were enacted as section 212(g) of the Act, 75 Stat. 655, 8 U.S.C. § 1182(h) (Supp. IV 1963). Hereinafter we will refer to this section as 212(g).

[5]When taken advantage of by Silva on February 16, 1961, the applicable part of 8 C.F.R. § 249.1 was in the following form:

"§249.1 *Application.* Any alien who believes that he meets the eligibility requirements enumerated in section 249 of the act shall apply on Form I-485 to the district director having jurisdiction over his place of residence. *An otherwise eligible alien who is inadmissible under paragraphs 9, 10, or 12 of section 212(a) of the Act may be granted a waiver of those enumerated grounds of inadmissibility pursuant to the provisions of section 5 of the Act of September 11, 1957, in a proceeding under this part.* The applicant shall be notified of the decision and if the application is denied of the reasons therefor and of his right to appeal in accordance with the provisions of part 103 of this chapter." (Emphasis added.) (23 Fed. Reg. 6545 (1958), as amended 23 Fed.

procedure in conjunction with his application under section 249 of the Act, Silva requested a waiver of section 212(a)(9) on February 16, 1961.

As stated in section 212(g), the only aliens who may obtain such a waiver are those who bear an indicated relationship to a United States citizen, or to an alien lawfully admitted for permanent residence, and who fulfill other conditions specified in the statute, to be discussed below. Silva met this initial relationship requirement because he was the husband and father of citizens of the United States.

Two other conditions had to be met in order to obtain a waiver under section 212(g). *First*, it was necessary for Silva to establish to the satisfaction of the Attorney General that (a) his exclusion would result in extreme hardship to his wife or children, and (b) his admission would not be contrary to the national welfare, safety or security of the United States. *Second*, it was necessary for the Attorney General, in his discretion, to consent to the waiver.[6]

otherwise.

The application made under section 249 and the related request for waiver of section 212(a)(9) came before District Director George K. Rosenberg for consideration. Counsel for Silva requested an opportunity,

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Reg. 9124 (1958), 24 Fed. Reg. 2584 (1959), and 24 Fed. Reg. 4906 (1959).)

This regulation has been amended twice since that date, although it has not been changed in substance. 8 C.F.R. §249.1-249.2 (Supp. 1963).

[6]Section 212(g) provides for the Attorney General's consent "to the alien's applying or reapplying for a visa and for admission to the United States." With regard to aliens, such as Silva, already resident in the United States, this provision has been administratively construed as requiring the discretionary consent of the Attorney General to the waiver. Appellant does not contend

to present oral testimony and this was granted. On the basis of this testimony and exhibits offered at the same time, and on the basis of the application and request and the documents submitted in support of them, the district director, on June 23, 1961, denied the request for waiver. The district director also, and necessarily in view of the denial of the request for waiver, denied the application under section 249 for a record of lawful admission for permanent residence.

These orders are set at the end of a twenty-five page document in which the district director discussed the issues of fact and law. Indicating his reasons for denying the request for waiver, the district director first held that Silva had failed to establish that his exclusion from the United States would result in extreme hardship to his wife or children. This official further held that even if Silva were able to meet this statutory eligibility requirement of extreme hardship, the favorable exercise of the Attorney General's discretion is not warranted. The district director based this conclusion on his evaluation of the nature and extent of Silva's political activities, and his marital and extra-marital relations.

Silva appealed from these orders to the acting regional commissioner, Southwest Region. On December 4, 1961, the regional commissioner entered an order denying the application and dismissing the appeal.[7] On the question of whether Silva had met the statutory eligibility requirement of extreme hardship, the regional com-

[7]Under Service appeal nomenclature, an order of a district director or special inquiry officer is sustained on the merits by "dismissing" the appeal, rather than by "affirming" the order. This is to be distinguished from judicial appeal nomenclature in which "dismissal" indicates rejection of an appeal on procedural or jurisdictional grounds without reaching the merits.

missioner found contrary to the district director. But the regional commissioner held, as had the district director, that Silva does not merit the favorable exercise of discretion of the Attorney General which is a requisite to the granting of a waiver under section 212 (g).[8]

It will be noted that, in denying the request for waiver, neither the district director nor the regional commissioner determined whether Silva met the second statutory eligibility requirement, *i.e.*, that his admission be not contrary to the national welfare, safety, or security of the United States. Silva argues that the failure to make this determination constitutes error, requiring that the order be set aside.

The lack of an express ruling as to this eligibility requirement can mean only one of three things: (1) the regional commissioner assumed that Silva did not meet this eligibility requirement; (2) the commissioner assumed that Silva did meet this requirement; or (3) the commissioner made no assumption or sub silentio ruling whatever concerning that requirement.

Nothing contained in the regional commissioner's decision indicates that he assumed that Silva did not meet this requirement, and Silva makes no such contention.

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[8] In explanation of this ruling the regional commissioner stated:

> "Upon consideration and review of the entire record it is concluded that the applicant does not merit the exercise of the discretion contained in Section 5 of the Act of September 11, 1957. His extramarital relations, his several marriages and divorces, his conviction for grand theft and subsequent reincarceration as a parole violator, his most recent trial for vote fraud which, although ending in acquittal, when considered with the unfavorable aspects of his political activities, must all enter into this decision."

That no such assumption was made is also indicated by the fact that the commissioner dealt with and determined the matter of discretion. But if, contrary to all indications, the regional commissioner did make an assumption adverse to Silva as to the second eligibility requirement, that would not be prejudicial to Silva unless it somehow could have affected the exercise of discretion vested in the Attorney General. There is nothing whatever in the regional commissioner's decision, or otherwise, tending to establish that his exercise of discretion was so influenced.

If anything is to be implied concerning the regional commissioner's opinion as to the second eligibility requirement, in view of his silence on the point, it is that he assumed that the requirement had been met. This would explain why the regional commissioner thought it necessary to proceed to a determination of the matter of discretion. The fact that a determination in his favor on the second eligibility requirement was manifested by an unexpressed assumption instead of an express ruling would not prejudice Silva, either as to the determination of that matter or the exercise of the Attorney General's discretion.

If the lack of an express ruling on the second eligibility requirement is to be taken as an indication that no determination whatever was made as to that matter, Silva was likewise not prejudiced. In that event, the matter left to the Attorney General's discretion must have been exercised without reference to the facts concerning eligibility. This is as it should be, whether or not there are express rulings on the questions of eligibility. Had the regional commissioner ruled that Silva met both eligibility tests, he was still empowered

to deny the request for waiver in the exercise of discretion. His power could not be less where no such ruling had been made.

Silva calls attention to *Jay v. Boyd*, 351 U.S. 345, 353, a case involving the discretionary form of relief known as suspension of deportation. The court there said that eligibility for such relief "is governed by specific statutory standards which provide a right to a ruling on an applicant's eligibility."[9] Granting the application, by analogy, of this statement to the problem now before us, we do not believe that it helps Silva.

Where discretionary relief is denied on the ground of ineligibility, the ruling is subject to full court review, as in *McGrath v. Kristensen*, 340 U.S. 162, 169. In order to provide a basis on which there can be such a review, there must be a full and fair hearing as to those matters. But, as we have already stated, there is here nothing to indicate that discretionary relief was denied by the regional commissioner on the ground of ineligibility. Thus Silva could not possibly have been prejudiced by the lack of an express ruling as to eligibility.[10]

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[9]The court further said, in *Jay v. Boyd*, at page 352:

"We note that petitioner does not suggest that he did not receive a full and fair hearing on evidence of record with respect to his statutory eligibility for suspension of deportation. In fact, petitioner recognizes that the special inquiry officer found in his favor on all issues relating to eligibility for the discretionary relief and that those findings were adopted by the Board of Immigration Appeals. This favorably disposed of petitioner's eligibility for consideration for suspension of deportation—the first step in the suspension procedure." (Footnote omitted.)

[10]Silva cites several other court decisions and agency rulings on this branch of the case, none of which, in our opinion, are in point.

We conclude that the regional commissioner did not err in denying the request for waiver on the discretionary ground, without first making an express ruling on the second element of statutory eligibility specified in section 212(g).

On the assumption that the district director or regional commissioner found that Silva failed to establish the second element of statutory eligibility, Silva argues that there has been an erroneous factual determination amounting to "arbitrariness."

As before indicated, we believe such an assumption is unwarranted, and that, in any event, there is nothing to indicate that any such assumption affected the regional commissioner's exercise of discretion. Accordingly, we need not decide whether, if such an assumption were made, it represented such an erroneous factual determination as to manifest arbitrary action.

Silva contends that the regional commissioner considered evidence outside the record of the hearing concerning matters subsequent thereto, in support of his determination that Silva did not merit the favorable exercise of the Attorney General's discretion. Such action, Silva argues, was arbitrary and capricious and amounts to a denial of due process.

In support of this contention Silva refers to one of the reasons given by the regional commissioner for denying the request for waiver on discretionary grounds. This reason was ". . . his [Silva's] most recent trial for vote fraud which, although ending in acquittal, when considered with the unfavorable aspects of his political activities, must all enter into this decision."[11]

[11] All of the regional commissioner's reasons are quoted in note 8.

The hearing before the district director was completed on April 17, 1961, and the decision of that official was handed down on June 23, 1961. The "vote fraud" trial, to which the regional commissioner referred, was commenced by a state-court indictment returned on July 25, 1961. The criminal action was dismissed on November 15, 1961, after trial and a jury verdict against Silva, on the ground of insufficiency of the evidence. The argument before the regional commissioner was held on November 21, 1961. His decision was rendered on December 4, 1961.

There is, as Silva concedes, no express statutory or regulatory grant of any right to a hearing on a request, pursuant to section 212(g), for a waiver of a ground of admissibility. Such a request, and the related application under section 249 for a record of lawful admission for permanent residence, are ordinarily determined on the basis of the request, application, and the documents submitted in support of them.

But, in this case, Silva's attorney requested an opportunity to present oral testimony, and the district director granted the request.[12] However, it was never represented to Silva or his attorney, at that time or later, that the discretionary phase of the agency's action would be based solely on facts developed in the presence of Silva at a hearing before the district commissioner.

That Silva and his counsel understood that the exercise of discretion was not so limited, and acquiesced therein, is demonstrated by the nature of the argument Silva's counsel made before the regional commissioner on the appeal. In the course of that argument coun-

[12] This was pursuant to authority vested in the district director under 8 C.F.R. § 103.2.

sel made no attempt to confine himself to the record made before the district director at the time of Silva's oral testimony. On the question of hardship Silva's counsel called attention to "some new developments" in the family status since the hearing of April, 1961. With regard to Silva's political activities, which had been referred to by the district director, Silva's attorney told the regional commissioner of events which had occurred in July, 1961. He also called attention to newspaper articles published on October 22 and November 5, 1961, reporting certain political activity.

Concerning the specific item of new information which, Silva contends, the regional commissioner should not have considered, it appears that his attorney fully and voluntarily developed the facts during his argument before the regional commissioner.[13] Silva is not

[13]Silva's counsel told the regional commissioner:

"I will now turn to the political issue which has served as a basis for denying the discretionary waiver to Mr. Silva. There have been new developments since the hearing and you have inquired of me the result of the recent trial concluded in Los Angeles where Mr. Silva was a defendant along with a lady who was City Registrar of Irwindale. Mr. Silva was charged with five counts of violation of the elections code of the state of California, specifically that he had promised a job to a particular individual in exchange for voting in a certain fashion and that he had aided in registering a person or persons who were ineligible to vote because of lack of the one year residence required in the state of California. The family involved in both instances was named Garza. After a three week trial before a jury which was concluded on or about November 8, Mr. Silva and the lady were found guilty on all counts. Judge Drucker who presided at the trial thereupon set a date for the following week to hear a motion for a new trial. This hearing was held on or about November 15 and the judge first granted the motion for a new trial and then dismissed all of the charges against Mr. Silva and the lady on the ground that there was no evidence sufficient upon which to base a conviction. . . . To complete the picture regarding offense, I have been told that

in a position to complain because the regional commissioner took note of this and other information which his own counsel supplied concerning events subsequent to the session before the district commissioner. There is no claim that the regional commissioner did not correctly understand the facts concerning the vote fraud trial.

Apart from the manner in which the vote fraud trial information reached the regional commissioner, Silva argues that since the trial resulted in acquittal it should not have played any part in the exercise of discretion in passing upon the waiver request. In our opinion, however, the consideration of this information along with the other factors mentioned by the regional commissioner did not manifest arbitrary and capricious action. At the very least, this development demonstrated that Silva, who was not qualified to vote, still persisted in political activity of a nature which had gotten him into trouble with his parole officers and others over a considerable period of time.

At the outset of the proceedings before the district director, Silva's counsel was told to reserve any objections to questions which he might have until all of the oral statements had been received. Silva contends that this ruling denied him a fair hearing. He also argues that the transcript of the proceedings was wholly inadequate.

Counsel for Silva made no objections to questions at the close of the testimony. We are told he could not

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the District Attorney's office is considering an appeal from Judge Drucker's decision dismissing the charges. I am not conversant with any appeal allowable but I mentioned it only because the newspapers have stated that such an action was contemplated."

then have done so because it was a lengthy hearing and he did not have a daily transcript. But Silva had a transcript for the purposes of this court proceeding and still he suggests no objections that he would have made. Accordingly, and entirely apart from the question of whether Silva should have been accorded the right to voice objections during the course of the proceedings, we conclude that no prejudice has been shown. In our opinion the transcript was not so inadequate as to constitute reversible error.

Silva asks us to reverse and remand to the agency, so that he can start again before a special inquiry officer under new procedures resulting from a December 16, 1961 amendment of 8 C.F.R. § 242.8(a), effective January 22, 1962.

We do not regard this as a proper ground for reversal. In amending this regulation the agency did not intend to provide a basis for reopening proceedings which had already become final at the agency level. This is made clear in a statement issued in connection with the promulgation of the amendment of §242.8(a). See 26 Fed. Reg. 12111, December 19, 1961.

The judgment is affirmed.

(Endorsed) Opinion Filed December 30, 1963.

Frank H. Schmid, Clerk.

APPENDIX B.

Memorandum Decision.

United States District Court, Southern District of California, Central Division.

Antonio Rodriguez Silva, Plaintiff, v. Harlan B. Carter, as Regional Commissioner, Immigration and Naturalization Service, Southwest Region, San Pedro, California, Defendant. Civil No. 62-6-JWC.

Since plaintiff is a resident of this country, although deportable, he is not an "excludable" alien within the meaning of Section 2. An "excludable" alien refers to one who is outside the country seeking admission. Consequently, plaintiff has no standing to apply for relief under this statute. *United States v. Esperdy*, 281 F. 2d 182.

Even if this were not so, plaintiff cannot prevail. Plaintiff concedes that in order to succeed upon his application under Section 249, he must in accordance with Section 5 "establish to the satisfaction of the Attorney General that his admission to the United States . . . would not be contrary to the national welfare, safety or security."

The Regional Commissioner, acting for the Attorney General, has found from the record that the "appellant does not merit the exercise of discretion contained in Section 5 of the Act of September 11, 1957." Plaintiff interprets the Regional Commissioner's decision as constituting a failure to exercise the discretion given to the Attorney General under Section 5 and insists that he is entitled to have his eligibility determined. But what the Commissioner was saying was that the plaintiff had failed to establish his admissibility to the

satisfaction of the Attorney General and that the Attorney General was therefore exercising his discretion unfavorably to the plaintiff's application for admissibility upon the grounds therein stated.

Since this decision is directed to the discretion of the Attorney General, a review therof by the courts must be confined to narrow limits. *Chao-Ling Wang v. Pilloid*, 385 F. 2d 547; *McKay v. McAlexander*, 268 F. 2d 35, (cert. denied, 362 U.S. 961); *Cakmar v. Hoy*, 265 F. 2d 59; *Fugiani v. Barber*, 261 F. 2d 709.

In *Jay v. Boyd*, 351 U.S. 345, the Court said that although deportable aliens have a right to a discretionary determination, "a grant thereof is manifestly not a matter of right under any circumstances, but rather is in all cases a matter of grace. Like probation or suspension of criminal sentence, it 'comes as an act of grace,' *Escoe v. Zerbst*, 295 U.S. 490, and 'cannot be demanded as a right,' *Berman v. United States*, 302 U.S. 211." Any review of such discretion involved in this type of determination should be limited to a determination of whether or not procedural due process has been afforded the alien. *Cakmar v. Hoy*, supra.

Plaintiff further contends that the hearing accorded him by the administrative officers was unfair in that objections of counsel were prohibited. He concedes that neither the statutes nor the regulations provide for a formal hearing on an application for Section 249, but he contends that since one was afforded him, he is entitled to procedural due process. The Director made it clear that, although he did not wish any testimony interrupted by objections as it was being given, he would give appellant and his attorney a full opportunity to make any objections which they might wish to make

at the completion of the hearing. No attempt was thereafter made to interpose any objections whatever and no prejudice has been pointed out. Constitutional requirements of due process therefore have been fully satisfied.

Plaintiff further objects that the transcript of proceedings was wholly inadequate as a verbatim record. Although the record leaves much to be desired, it appears to be reasonably complete and accurate to the point where it cannot be said that the failure to provide a better one was a denial of due process, especially in the absence of any showing of prejudice.

The complaint on file herein will be dismissed.

Dated this 11th day of December, 1962.

/s/ Jessee W. Curtis
United States District Judge.

APPENDIX C.

Decision of Regional Commissioner.

United States Department of Justice, Immigration and Naturalization Service, Southwest Regional Office, Terminal Island, San Pedro, California.

December 4, 1961

FILE: All 775 073—Los Angeles

IN RE: Antonio Rodriguez-Silva aka Antonio R. Silva

IN SECTION 249 PROCEEDINGS, IMMIGRATION AND NATIONALITY ACT

IN BEHALF OF APPLICANT: Marshall E. Kidder, Esquire

APPLICATION: Creation of Record of Admission for Permanent Residence in conjunction with Waiver under Section 5 of the Act of September 11, 1957, of excludability under Section 212(a) (9) of the Immigration and Nationality Act

DISCUSSION: This case is before the Regional Commissioner on appeal from an order of the District Director denying the application under Section 249 of the Immigration and Nationality Act as well as a request for waiver made under Section 5 of the Act of September 11, 1957.

The applicant is a 53 year old married male, a native and citizen of Mexico. He last entered the United States in July of 1957 by claiming United States citizenship following a short visit to Mexico. He alleges that he first entered the United States at El Paso, Texas about March 16, 1918; however, no record of this entry can be found. Since that date he has made several departures and re-entries to the United States.

He is currently in the United States under an outstanding order of deportation.

Evidence of record establishes that he is inadmissible to the United States under Section 212(a) (9) of the Immigration and Nationality Act by reason of his conviction in California on January 23, 1953 of the offense of grand theft in violation of Sections 484 and 487 of the Penal Code of California. He has made application seeking to waive this inadmissibility under the provisions of Section 5 of the Act of September 11, 1957.

The District Director found that the applicant had failed to meet the statutory eligibility requirements of extreme hardship contemplated by Section 5 and that favorable exercise of the Attorney General's discretion under this Section was not warranted. Since the inadmissibility was not waived, the application under Section 249 was denied for failure to meet the statutory requirements of that Section.

In oral argument, counsel contends that "extreme hardship" should not be measured by an economical standard alone and that parental influence and guidance, where children are involved, is equally important.

With this the Regional Commissioner agrees. While it is true that the applicant has not been a major or steady contributor to the family's monetary requirements, it is believed that an extreme hardship would result to his two teenage children if they were to be deprived of his guidance and counsel during their important formative years. It is therefore found that the applicant's exclusion would result in extreme hardship to his United States citizen spouse and two children.

The grant or denial of the waiver, however, does not turn only on the issue of establishing "extreme hardship". Upon consideration and review of the entire record it is concluded that the applicant does not merit the exercise of the discretion contained in Section 5 of the Act of September 11, 1957. His extra-marital relations, his several marriages and divorces, his conviction for grand theft and subsequent reincarceration as a parole violator, his most recent trial for vote fraud which, although ending in acquittal, when considered with the unfavorable aspects of his political activities, must all enter into this decision.

Since the waiver of inadmissibility under the provisions of Section 5 has been denied in the exercise of the Attorney General's discretion, he remains ineligible under Section 249 of the Immigration and Nationality Act to have a record of admission for permanent residence created.

ORDER: It is Ordered that the application be denied and that the appeal be and the same is hereby dismissed.

M. F. Fargione
Acting Regional Commissioner
Southwest Region

APPENDIX D.

Statutes and Regulations Involved.

Section 249 of the Immigration and Nationality Act of 1952 (8 U. S. C. 1259, as amended August 8, 1958, 72 Stat. 546), provides as follows:

> "Sec. 249. A record of lawful admission for permanent residence may, in the discretion of the Attorney General and under such regulations as he may prescribe, be made in the case of any alien, as of the date of the approval of his application or, if entry occurred prior to July 1, 1924, as of the date of such entry, if no such record is otherwise available and such alien shall satisfy the Attorney General that he is not inadmissible under section 212(a) insofar as it relates to criminals, procurers and other immoral persons, subversives, violators of the narcotic laws or smugglers of aliens, and he establishes that he—
>
> (a) entered the United States prior to June 28, 1940;
>
> (b) has had his residence in the United States continuously since such entry;
>
> (c) is a person of good moral character; and
>
> (d) is not ineligible to citizenship."

Section 5 of the Act of September 11, 1957 (71 Stat. 640) re-enacted on Sept. 26, 1961 (75 Stat. 655) as 8 U. S. C. A. 1182(h)) provided as follows:

> "Sec. 5. Any alien, who is excludable from the United States under paragraphs (9), (10), or (12) of section 212(a) of the Immigration and Nationality Act, who (A) is the spouse or child, including a minor unmarried adopted child, of a

United States citizen, or of an alien lawfully admitted for permanent residence, or (B) has a son or daughter who is a United States citizen or an alien lawfully admitted for permanent residence, shall, if otherwise admissible, be issued a visa and admitted to the United States for permanent residence (1) if it shall be established to the satisfaction of the Attorney General that (A) the alien's exclusion would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, or son or daughter of such alien, and (B) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States; and (2) if the Attorney General, in his discretion, and pursuant to such terms, conditions, and procedures as he may by regulations prescribe, has consented to the alien's applying or reapplying for a visa and for admission to the United States."

Title 8, Code of Federal Regulations, Section 249.1, in effect at the time of petitioners hearing, provided as follows:

"Sec. 249.1 *Application.* Any alien who believes that he meets the eligibility requirements enumerated in section 249 of the Act shall apply on Form I-485 to the district director having jurisdiction over his place of residence. *An otherwise eligible alien who is inadmissible under paragraphs (9), (10), or (12), of section 212 (a) of the Act may be granted a waiver of those enumerated grounds of inadmissibility pursuant to the provisions of section 5 of the Act of September 11, 1957, in a proceeding under this part.* The applicant shall be

notified of the decision and if the application is denied of the reasons therefor and of his right to appeal in accordance with the provisions of Part 103 of this chapter. If the application is granted, a Form I-151, showing that the applicant has acquired the status of an alien lawfully admitted for permanent residence, shall not be issued until the applicant surrenders any other document in his possession evidencing compliance with the alien registration evidencing compliance with the alien registration requirements of former or existing law." (Emphasis added).

Affidavit of Service of Petition for Writ of Certiorari Pursuant to Rule 33.

State of California, County of Los Angeles—ss.

Viola Figg, being first duly sworn, deposes and says: That the affiant is a citizen of the United States of America, a resident of the County of Los Angeles, over the age of eighteen years, not a party to the within and above entitled action; that this affiant is making this service for Marshall E. Kidder who is the attorney for the Petitioner in this action; that this affiant is of the firm of Parker & Son, Inc., 241 East Fourth Street, who are the printers and agents in this matter for said attorney, and have their offices in the City of Los Angeles, State of California.

That on the 10th day of March, 1964, affiant served the within Petition for Writ of Certiorari on the Respondent in this action, by placing a true copy thereof in an envelope addressed to the attorney of record for said Respondent at the business/residence address of said attorney, as follows: Francis C. Whelan, United States Attorney, Donald A. Fareed, Gordon P. Levy, Assistant United States Attorneys, 600 Federal Bldg., Los Angeles 12, California. Honorable Archibald Cox, Solicitor General Department of Justice, Washington 25 D.C. at the county seat of said county by then sealing said envelopes and depositing the same, with postage thereon fully prepaid, in the United States Post Office at Los Angeles, California.

That there is delivery service by United States mail at the places so addressed or there is a regular communication by mail between the place of mailing and the places so addressed.

VIOLA FIGG.

Subscribed and sworn to before me this 10th day of March, 1964.

MARGARET H. FALES,
Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires January 11, 1966.

[Seal.]